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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	CC Docket No. 80-286
Jurisdictional Separations Reform)	
And Referral to the Federal-State)	DA 99-414
Joint Board)	

COMMENTS

The National Exchange Carrier Association, Inc. (NECA), National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), and Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), (collectively referred to as "Telephone Associations") submit their comments in response to the Federal Communications Commission's (FCC or Commission) *Public Notice*¹ regarding a December 21, 1998 *Report* by the State Members of the Federal State Joint Board (Joint Board) on Separations.² The *Public Notice* invites comment on a number of issues, including the *Report's* recommendation that a three-year rolling average of separations usage factors be adopted on an interim basis until comprehensive separations reform can be adopted.

The Telephone Associations agree with the State Members that an interim measure is necessary while the Joint Board and the Commission complete their review of

¹ *Report Filed by State Members of Joint Board on Jurisdictional Separations*, CC Docket No. 80-286, *Public Notice*, DA 99-414 (rel. Feb. 26, 1999) (*Public Notice*).

² *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, *State Members' Report on Comprehensive Review of Separations* (fil. Dec. 21, 1998) (*Report*).

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the jurisdictional separations procedures.³ As the State Members recognize, the current separations process does not accurately reflect today's telecommunications markets.⁴ These rules were designed almost exclusively to address proper jurisdictional treatment of voice traffic over a regulated monopoly's network. However, the separations rules have not kept pace with recent significant statutory, technological, and market changes. These changes are causing a variety of anomalies in the application of separations rules, which must be addressed immediately.

The State Members acknowledge,⁵ and the record in CC Docket 80-286 demonstrates, that inability to accurately measure traffic, especially Internet usage, used in determining separations allocations of advanced technologies, is an area of prime concern. As has been explained in previous filings with the Commission, Internet traffic exhibits dramatically different calling patterns and usage characteristics than voice traffic.⁶ To the extent that this traffic is treated as intrastate in cost separations studies, it causes unforeseen consequences in separations results.⁷ While the distorting effect of Internet traffic on separations studies did not reach serious proportions in previous years, increases in Internet usage are expected to produce significant effects on exchange carriers' traffic and separations studies in current and future data years.

³ *Id.* at 15.

⁴ *Id.* at 1.

⁵ *Id.* at 8.

⁶ See NECA Petition for Waiver of Section 36.2(a)(3) of the Commission's Rules (filed May 8, 1998) (pointing out that Internet traffic differs from voice in that it is predominantly data transmission and has disproportionately long holding times.)

⁷ *Id.*

The Commission's recent decision with respect to reciprocal compensation⁸ has only added to the need and the justification for an immediate action in this proceeding to prevent further distortions by use of separations procedures developed in the "pre-Internet" era. The Commission ruled there that "at least a substantial portion of dial-up ISP [Internet service provider] bound traffic is interstate"⁹ and that "the Commission traditionally has characterized the link from an end user to an ESP [enhanced service provider] as an interstate access service."¹⁰ However, the Commission went on to reaffirm its policy of exempting this "largely interstate"¹¹ traffic from interstate access charges and to provide that ESPs "continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs."¹² Finally, although the Commission emphasized that the exemption "does not transform the nature of traffic routed to ESPs . . . [or] affect the Commission's ability to exercise jurisdiction over such traffic,"¹³ it stated that "for those LECs subject to jurisdictional separations both the costs and the revenues associated with such connections will continue to be accounted for as intrastate."¹⁴ Despite the Commission's assertion, the inconsistent separations treatment

⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, FCC 99-38 (rel. Feb. 26, 1999) (*Reciprocal Compensation Order*).

⁹ *Id.* at ¶ 20.

¹⁰ *Id.* at ¶ 16.

¹¹ *Id.* at ¶ 23.

¹² *Id.* at ¶ 20.

¹³ *Id.* at ¶ 16.

¹⁴ *Id.* at ¶ 36.

of dial-ISP bound traffic must ultimately be addressed and reconciled in CC Docket 80-286. The Telephone Associations recognize that an interim freeze is a temporary solution to a problem that cries for a rational solution.

The result of the Reciprocal Compensation decision is to continue to accelerate the unwarranted shifts in interstate costs into the intrastate jurisdiction and the resulting distortions in the separations factors, in turn shifting other costs to the intrastate jurisdiction. To resolve this problem, the Commission should consider imposing an interim “freeze” on separations factors, as suggested by several participants in earlier phases of this proceeding.¹⁵ This freeze for non-price cap carriers could be based on data from a representative prior period, such as an average three-year period, or on a single one-year period.¹⁶ Only an expedited freeze of the separations factors can stop the misclassification of Internet traffic from reaching the exact opposite result of what the Supreme Court intended when it required the “appropriate recognition of the competent governmental authority in each field of regulation.”¹⁷ In other words, without an interim freeze to prevent further interstate costs from being left for intrastate recovery, the

¹⁵ See, e.g., The Rural Telephone Coalition Comments on *NPRM* at 9-10 (Dec. 10, 1996) (supports an interim freeze for rural ILEC’s jurisdictional factors while the Commission revamps the access charge and universal service rules); and USTA Comments on *NPRM* (Dec. 10, 1996) (USTA’s freeze proposal is suggested to simplify separations procedures, but it could also be successful in solving the problems associated with Internet traffic.) Other parties proposed removal of Internet usage entirely from development of usage based traffic factors, before separating federal and state costs. See, e.g., Dobson Telephone Company and McLoud Telephone Company Comments on *NPRM* at 3 (Dec. 10, 1996). Removal of Internet traffic from separations studies would also be effective in preventing distortions to separations results associated with Internet traffic.

¹⁶ The selection of a specific time period is important. To be effective, the freeze should stop the unjustified cost shifts at a point before they have done serious damage to the reliability of the usage factors and the fundamental validity of jurisdictional separations results.

¹⁷ *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930).

Commission's order will increasingly and unlawfully saddle the states with the confiscation liability for recovering interstate costs via intrastate rates. State Members acknowledge that the prohibition against uncompensated "takings" is at the core of the requirement to properly allocate costs between jurisdictions.¹⁸ Additionally, the State Members' rolling average will result in shortfalls that will not be addressed in the interim during which state and federal USF support mechanisms are being developed.

In contrast, a freeze would provide stability and predictability as the Commission and the states deal with other issues that require prompt resolution and coordination, such as universal service and access issues, and the many pending cost recovery issues related to new requirements imposed by Congress and the Commission.¹⁹

Under the State Members' proposed interim solution to anomalies currently affecting separations results,²⁰ ILECs would average the latest three years of separations usage factors on an ongoing basis.²¹ The State Members believe that this proposal will dampen the impact of usage changes and resultant cost shifts from year to year.²²

¹⁸ See *Report* at 3. The State Members' three-year rolling average will not alleviate confiscation issues since, as explained above, ISPs obtain services using local business lines, and do not pay charges on related usage. To the extent that these higher levels of costs are allocated to the intrastate jurisdiction, and not reflected in local tariff rates paid by ISPs, they may not be recovered by the carrier, causing a "takings" issue to arise.

¹⁹ For example, the Commission is currently considering cost recovery issues related to CPNI protection and local number portability. See, e.g., Pleading Cycle Established for Comments on Petition for Expedited Interim Waiver of Section 52.33 of the Commission's Number Portability Rules, CC Docket No. 95-116, CCB/CDP No. 99-9, *Public Notice*, DA 99-581 (rel. March 24, 1999).

²⁰ *Report* at 15.

²¹ *Id.*

²² *Id.*

In the Telephone Associations' view, however, using a three-year rolling average does not adequately address the separations distortions caused by changing technologies and network usage patterns. For example, to the extent that Internet usage is reflected in separations factors as intrastate traffic, increases in this predominately interstate traffic²³ will increasingly cause shifts in revenue requirements to the intrastate jurisdiction, distorting separations results. The State Members' proposed three-year rolling average does not solve this problem; it merely spreads the inevitable cost shift over a slightly longer period of time.

Arguably, long-term solutions for this problem may be developed in the context of the Commission's Access Charge and Separations Reform proceedings. The introduction of new technologies, such as xDSL and frame relay services, may also partially facilitate solutions to the jurisdictional cost recovery problems caused by Internet traffic. To the extent that these regulatory and market-based solutions occur over time, however, the three-year average will not be sufficient to avoid distortions in separations results.

The State Members' proposal also conflicts with the Commission's goal of simplifying separations procedures.²⁴ If adopted, this proposal will require carriers to implement additional procedures to determine jurisdictional allocations, procedures that represent unnecessary administrative burdens for the mostly small and rural ILECs who are primarily subject to separations rules.

²³ *Reciprocal Compensation Order* at ¶ 20.

²⁴ See Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120 at ¶ 25 (1997)(NPRM).

Conclusion

The Telephone Associations agree with the State Members of the Joint Board that an interim separations mechanism is necessary, pending further study of separations reform. The Commission and Joint Board should therefore consider adopting an interim "freeze" mechanism that will halt separations distortions resulting from changes in technology and network usage patterns. This approach, if adopted, will contribute to the successful achievement of Commission and Joint Board goals in this proceeding, and will reduce regulatory burdens and costs for these carriers consistent with the public interest.

Respectfully submitted,

March 30, 1999

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